OCT 1 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., Inc., JOSEPH L. AUER, HARRY K. BARR, VANDIVER BROWN, WILLIAM L. CANADY, NEIL P. CULLOM, HAROLD W. DANSER, EDWARD FOSTER, JOHN KADEL, ALFRED D. MARTIN, EDWIN L. MUNZERT, HAROLD M. TILLINGHAST, DANIEL BEISINGER, WILLIAM F. BYRNE, ARTHUR DRESSEL, CHARLES A. HARLESS, JOHN R. KINGAN, CHARLES E. LITTLETON, W. J. V. MURPHY,

Respondents.
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

GUSTAVE B. GARFIELD,
Attorney for the Petitioner.

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In the

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No. .....

Nathan Katz, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. Hoe & Co., Inc., Joseph L. Auer, Harry K. Barr, Vandiver Brown, William L. Canady, Neil P. Cullom, Harold W. Danser, Edward Foster, John Kadel, Alfred D. Martin, Edwin L. Munzert, Harold M. Tillinghast, Daniel Beisinger, William F. Byrne, Arthur Dressel, Charles A. Harless, John R. Kingan, Charles E. Littleton, W. J. V. Murphy,

Respondents.
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

Your petitioner, Nathan Katz, a resident of Connecticut, suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc. (a New York Corporation) similarly situated, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division of the Supreme Court of the State of New

York, First Judicial Department entered in the office of the Clerk of the County of New York, on April 27, 1951, which (1) unanimously affirmed a judgment dated October 31, 1950, rendered by the special term of the Supreme Court of the State of New York, New York County, after trial before Justice Denis O'Leary Cohalan, without a jury, by which judgment the petitioner's Second Amended Complaint seeking a declaratory judgment and injunction was dismissed on the merits and (2) unanimously affirmed an order of the said trial court and justice dated November 3, 1950, denying petitioner's motion for a new trial. Timely motion (within 30 days) for leave to appeal to the Court of Appeals of the State of New York was made on May 15, 1951 and denied without opinion (100 N. E. 2nd 196) by said court on July 11, 1951. The filing of this petition for a writ of certiorari on or before October 9, 1951 would therefore be timely under *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

Jurisdiction

Jurisdiction is invoked under section 237 b. of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 935).

The Opinions Below and in a Companion Case

The opinion of the Appellate Division, First Department is reported in 278 App. Div. 766. The opinion of Justice Cohalan, is reported in 199 Misc. 459 (R. 1948-1962).

The opinion of the Special Term, New York County, Justice Samuel Dickstein presiding, denying defendants' motion to dismiss petitioner's complaint and also denying petitioner's motion for an injunction *pendente lite* is reported unofficially, in 99 N. Y. Supp. 2d 899. Said order of

Justice Dickstein having been unanimously modified by the Appellate Division, First Department, by granting a stay pending trial and as modified unanimously affirmed, is reported in 277 App. Div. 966.

The opinion of Judge McGohey, in a companion case is reported in 93 Fed. Supp. 762.

The opinion in the Appraisal proceeding is entitled Application of Wood, 103 N. Y. S. 110 (not officially reported. Neither it nor Justice Dickstein's opinion, also unofficially reported, are printed in the appendix, but all other opinions are).

Questions Presented

In 1934 R. Hoe & Co., Inc. (hereinafter sometimes referred to for convenience as "Hoe"), one of the oldest industrial concerns in America, found itself insolvent. It filed for relief under section 77B of the Bankruptcy Act. Its Plan of Readjustment accepted by two-thirds of its common stockholders and "A" stockholders, and approved by the decree of the United States District Court for the Southern District of New York, provided for the election of eleven directors, all of whom were to be elected by the *cumulatve vote* of the respective classes of stockholders. After the elimination of a Preferred Stock issue, temporarily created by the plan to take care of interest on the claims of bond creditors, *the plan provided for the election by the common stockholders of two directors voting cumulatively as a class and nine by the "A" stockholders "and provided further that, except with the consent of the majority of the common stock, no amendment to the Certificate of Incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time"* (R. 10). Hoe's Certificate of Incorporation was amended in accordance with the plan.

In 1947 when the Preferred stock had been completely eliminated, the "A" stockholders, acting under a provision of the Certificate of Incorporation giving them the right to consolidate with a subsidiary under section 86 of the Stock Corporation Law of the State of New York, without the consent of the common stockholders, did so consolidate with a subsidiary. *But they represented in the "proxy statemen" and it is a fact, that the voting rights of the common stockholders were to remain unaffected by such consolidation.* Accordingly the provisions for cumulative election of two directors by the common stockholders and non-amendability of the corporate charter without the consent of a majority of the common stockholders were carried over and continued in the 1947 Certificate of Consolidation.

Petitioner acquired 500 shares of the common stock of Hoe on December 23, 1949. At the time of the acquisition of his shares, the 1947 Certificate of Consolidation and the common stock certificates contained the foregoing provision for cumulative voting by common stockholders in the election of two directors and for the non-amendability of the certificate so as to divest the common stockholders of that right, except with the consent of a majority of the common stock (R. 504-7).

On July 11, 1950, without any corporate resolution, Hoe's general counsel who was chairman of the Board of Directors formed a dummy corporation under New York law, calling it Hoe Export-Import Corporation and three days thereafter on July 14, 1950 the nine "A" stock directors, over the opposition of the two common stock directors, at a meeting of Hoe's Board of Directors voted to submit to the "A" stockholders *alone* the consolidation of Hoe with its newly formed subsidiary Hoe Export-Import Corporation. This subsidiary had no assets or liabilities and had never done any business whatsoever. The "A" stock directors proposed under the guise of consolidation to amend the certificate of incor-

poration of Hoe so as to eliminate cumulative voting in the election of directors. Incidentally the so-called consolidation plan also provided for issuance to the "A" stockholders of two shares of new common stock for each "A" share, thus permanently vesting control of the common stock in the "A" stockholders.

Petitioner sued on August 18, 1950, before the meeting of "A" stockholders called for September 12, 1950, to restrain the said meeting and for a judgment declaring that said amendment of the certificate of incorporation constituted a deprivation of petitioner's property without due process of law, in violation of the fifth and fourteenth amendments to the United States Constitution, and a violation of the 1935 decrees of the United States District Court for the Southern District of New York approving the Plan of Readjustment (R. 14-15).

Although the Federal Questions were adequately presented at the very outset of the trial in the Second Amended Complaint served at the direction of the trial court "so that the Appellate Court or courts will have before them the contentions of the parties embodied in written instruments called complaints and answers, rather than having to go to the record to find out what the parties really contended" (R. 60), neither the trial court nor any Appellate Court has passed upon the Federal Questions squarely presented to them. Although repeated in the petitioner's proposed findings of fact and in the order denying a motion for a new trial the questions were unanswered, by the trial court. In evading an answer to the Federal Questions, the trial court placed its decision on two alleged state grounds, namely (1) noninterference with corporate management in the absence of fraud or improvidence, and (2) common stockholders are compelled to make the choice of either (a) taking the new stock or (b) surrendering their stock before the meeting of "A" stockholders and filing for appraisal. Peti-

tioner contends that such evasion by both the trial and Appellate Courts was for the purpose of defeating a review of the Federal Questions by this court.

Holders of 93,000 common shares (out of 160,000 outstanding), including petitioner, have not filed for appraisal. These stockholders numbering over 500 are scattered throughout the country. Those who did so file for appraisal (see Application of Woods, 103 N. Y. Supp. 2nd 110) have been litigating for one full year to have the value of their shares fixed. But as yet no conclusion has been reached.

By this device of consolidation with a paper subsidiary the "A" stockholders have while retaining their "A" stock, issued to themselves two shares of common stock for each "A" share, or a total of 191,994 shares of new common stock having a current market value of ~~$1,520,522.00~~ $1,535,952

Specifically, three principal Federal Questions are involved, which were properly raised below by petitioner.

1. Deprivation of cumulative and other voting rights.

Whether it is a deprivation of the property of the common stockholders of Hoe in violation of the Fifth and Fourteenth amendments of the United States Constitution to disfranchise them of and abrogate their right to cumulative voting in the election of directors and other voting rights in contravention of the explicit provisions of their stock certificates and Hoe's corporate charter?

2. Collateral modification of bankruptcy decrees and plans of reorganization by State courts.

Whether the decrees of the United States Districts Court entered in the bankruptcy proceeding of Hoe (R. 430-466) and the plan of readjustment and certificate of incorporation approved thereby are subject to collateral

attack or modification by judicial or administrative authorities of the State of New York by permitting the filing of a certificate of consolidation which amends the certificate of incorporation in violation of the terms of said decrees?

3. *Res adjudicata* of bankruptcy decrees.

Whether the District Court bankruptcy decrees and the Hoe Plan of Readjustment approved thereby are judgments *in rem* which the Courts of the State of New York must recognize under Federal Law under the doctrine of *Stoll* v. *Gottlieb*, 305 U. S. 165?

Additional questions are presented by the fact that the trial and Appellate courts below based their decisions on alleged grounds of State law in complete evasion of the foregoing federal questions for the purpose of defeating review by this court as petitioner contends.

4. Non interference with corporate management in absence of fraud or improvidence despite violation of federal decrees and vested property rights.

Whether a New York State court may refuse to grant relief for violation of vested cumulative and other voting rights under the situation presented by the Federal Questions 1, 2 and 3 upon the ground that in the absence of showing of fraud or improvidence, it will not substitute its judgment for that of stockholders or directors as to the economic wisdom of a plan of reorganization?

5. Appraisal the exclusive remedy in every case.

Whether appraisal under state law or acceptance of the new shares are the exclusive remedies of a class of disfranchised common stockholders who appeal to a state court to prevent the violation of their vested property rights as set forth in Federal Questions 1, 2 and 3 above?

8. Balancing of equities without answering federal questions.

Whether the Appellate Division after having itself vacated its own stay of the consummation of a plan of consolidation and thus permitted consummation thereof before hearing the appeal on the merits, can defeat a review by this court by failing to answer the foregoing Federal Questions presented to it and placing its decision upon the ground that rights, since such *vacatur* of its stay had accrued to third parties, who had meantime purchased shares in the consolidated corporation while the appeal was pending and that the balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to the plaintiff? (See *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673.)

Preliminary Statement

The First three Principal Federal Questions were adequately presented at the direction of the trial court in the Second Amended Complaint and were also presented in the motion for a new trial on questions of law, in accordance with State practice.

Petitioner in his Second Amended Complaint (R. 9-16) alleged that he was the owner of 500 shares of the Common Stock of R. Hoe & Co., Inc., having acquired his shares December 23, 1949; that R. Hoe & Co., Inc. went through reorganization under section 77B of the National Bankruptcy Act, in the United States District for the Southern District of New York; that on March 1, 1935 a decree was made in said court "Approving Modification of Plan of Reorganization and Finding Plan as Modified to be Fair"; that said plan *inter alia "provided further that, except with the consent of the majority of the common stock, no amendment to the Cerificate of Incorporation shall be made which shall impair the right of the Com-*

*mon Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time * * *"* (R. 10); that thereafter and on April 26, 1935 a decree was made in the said District Court in said 77B proceedings on notice to all classes of stockholders and creditors, that upon consent of two thirds in amount of the stockholders and creditors approving said plan, it was declared effective and the debtor R. Hoe & Co. discharged and put in possession of its property; that on July 11, 1950, the directors of R. Hoe & Co., Inc. elected by the "A" stockholders caused to be formed a dummy corporation under New York law called Hoe Export-Import Corporation which had never theretofore transacted business, had no assets or reason for existence except as a device to recapitalize and water down the common stock through the process of what was called a consolidation, without permitting the common stockholders to vote upon said recapitalization; that on August 8, 1950 the "A" directors proposed a plan of consolidation of Hoe Export-Import Corporation with R. Hoe & Co., Inc. submitting same to a vote of the "A" stockholders only; *"that to permit the defendants to carry out said reorganization and recapitalization under the guise of the aforesaid fraudulent consolidation without permitting the common stockholders the right to vote upon the said reorganization and recapitalization, would be and does constitute a deprivation of plaintiff's property without due process of law, contrary to * * * Constitution of the United States of America * * * Amendments 5 and 14 thereof, and in violation of the voting rights conferred upon the Common Stockholders as a class, by the decrees of the United States District Court for the Southern District of New York and the Plan of Reorganization therein set forth and incorporated, dated March 1, 1935 and April 25, 1935 * * *"* (R. 14). Petitioner demanded judgment for an injunction restraining the holding of said meeting of "A" stockholders pursuant to said Notice of Meeting dated August 8,

1950, *"and for a declaratory judgment that the said proposed meeting if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of * * * the Constitution of the United States of America, and amendments 5 and 14 thereof"* (R. 15).

In entering and signing the order denying plaintiff's motion for a new trial on November 3, 1950, the trial court took official notice of petitioner's contention that the court had failed to take cognizance of the Plan of Readjustment entered in the 77 B proceedings and of the decrees of the United States District Court for the Southern District of New York dated March 1st, 1935, April 26, 1935 and June 25, 1935, *"which provide that the common stockholders shall elect two directors voting cumulatively:* shall have equal voting rights on all matters other than the election of directors: *and that the Certificate of Incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class"* (R. 49).

In the order denying a motion for a new trial the trial court also overruled petitioner's contention that the controlling decision of the Supreme Court of the United States in *Stoll* v. *Gottlieb,* 305 U. S. 165 required the trial court to give effect as *res adjudicata* to the terms of the Plan of Readjustment contained in the order of the United States District Court dated March 1, 1935 and "that said plan is not subject to collateral attack and by the Court's decision it collaterally attacks and voids as if it never existed, the Plan of Readjustment contained in the order of March 1, 1935" (R. 50).

Since the Second Amended Complaint and the order denying petitioner's motion for a new trial were before the Appellate Division and before the Court of Appeals in the Record on Appeal, as it now appears before this Court, petitioner respectfully submits that he has complied with the requirement of showing properly raised federal ques-

tions for review in this Court. A fuller record proof of this fact required by the rules of this Court will be adverted to later in this statement with quotations from pertinent portions of the record to sustain petitioner's contentions.

Statement

R. Hoe & Co., Inc., a New York corporation (hereinafter sometimes referred to as Hoe), was organized in 1924, as successor of an old established business founded about 1815. It manufactures printing presses and other products. On August 1, 1934 an order was entered in the United States District Court for the Southern District of New York approving the petition of Hoe for relief pursuant to the provisions of section 77B of the Bankruptcy Act as amended (48 Stat. 912). At the time of the filing, the only amounts of stocks "Outstanding in the Hands of the Public were:

Class 'A' stock	96,000 shares
Common Stock (including voting Trust Certificates for Common Stock)	160,000 shares."

In a Plan of Readjustment proposed by the then debtor Hoe on March 1, 1935 (dated as of January 16, 1935) which plan was subsequently accepted by both classes of stockholders ("A" and Common), and by the U. S. District Court for the Southern District of New York it was provided in the "Introductory Statement" of the plan, "*until all the arrearages of dividends on the Class 'A' stock shall have been paid, the Class 'A' stockholders will be entitled to elect nine directors and the Common stockholders two directors.* * * * ALL VOTING FOR DIRECTORS WILL BE CUMULATIVE" (from page 2 of Plan quoted in appendix).

To effectuate the foregoing introductory or legislative provisions of the plan, provision was made under "Miscel-

laneous" items (p. 22 of plan) for the amendment of Hoe's certificate of incorporation so that "*continuing until all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period, the holders of common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the Board of Directors*", and it "*provided further that, except with the consent of the majority of the common stock, no amendment of the certificate of incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time*" (for fuller quotation from Plan of Readjustment, dated January 16, 1935, see appendix).

The Certificate of Incorporation of Hoe was accordingly amended on May 29, 1935 by the debtor R. Hoe & Co., Inc. pursuant to an order of the United States District Court, Southern District of New York dated May 15, 1935 (R. 435).

On June 25, 1935 an order was entered in the United States District Court for the Southern District of New York for Transfer of Property and final Consummation of the Plan of Readjustment, under Subdivision (f) of Section 77B (R. 444). Having been accepted by 57,094 shares of Class "A" stock and 154,567 shares of common stock (R. 440), claims based on 96,000 shares of "A" stock and 160,000 shares of common stock were "allowed to participate in the reorganization in the manner provided in the Plan" (R. 451).

On January 8, 1947, "without disturbing the common stock" (R. 23), Hoe proposed a plan of consolidation with a *bona fide* subsidiary, designed to eliminate arrears on "A" stock, then amounting to $83 per share. This was done by paying $3 per share in cash, and issuing four

shares of B stock (newly created) redeemable at $20 per share from earnings applicable to common stock. The plan, voted upon by "A" stockholders *alone* was represented as *"preserving the rights of Common stock and at the same time preserving for Class A Stockholders the substance of their present privileges and rights"* (R. 23). Indeed the provisions of the Plan of Readjustment of January 16, 1935 were carried over intact into the "Certificate of Incorporation and Certificate of Consolidation" so that the rights of the common stockholders to elect two directors voting cumulatively as a class and to vote on any amendment of the certificate of incorporation which would divest them of those rights were preserved to the letter.

Since the new issue of B stock was accepted by the "A" stockholders in full acquittance of cumulative dividend arrears on their stock, the certificate of incorporation was amended so as to provide for the continuance of the scheme of election of directors, contained in the Plan of Readjustment dated as of January 16, 1935, to wit: nine to be elected by the "A" stockholders and two by the common stockholders voting cumulatively as a class, while the B stock remained outstanding.

Upon elimination of the B stock, control of Hoe was to pass to the common stockholders who were then to become entitled to elect six out of the eleven members of the Board of Directors.

In accordance with the 1947 proposed plan of consolidation the Certificate of Incorporation was amended as follows:

(1) In paragraph Fifth, sub. (h) of the said 1947 Certification of Incorporated Consolidation it was provided: *"Continuing until no shares of B Stock shall be deemed to be outstanding, and until all dividends accumulated since October 15, 1946 and unpaid on the Class A stock are paid in full through the last quarterly dividend period, the hold-*

ers of Class A stock voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of Directors and the holders of the Common Stock, voting cumulatively as a class, shall be entitled to elect and continue in office, the two other members of the Board of Directors" (R. ~~1512~~ 504)

(2) In paragraph Sixth sub. (k) of the 1947 Certificate of Incorporation and of Consolidation it was provided: *"except with the consent of a majority of the Common Stock, no amendment of the Certificate of Incorporation or Certificate of Consolidation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors, from the time such right commences as provided in subparagraph (h) as such Board shall be constituted from time to time"* (R. ~~1518~~ 506)

Petitioner is the owner of 500 shares of the common stock of R. Hoe & Co., Inc., having acquired his shares December 23, 1949. As above demonstrated at the time of the acquisition of his shares, petitioner together with all other common stockholders had cumulative voting rights in the election of two directors and the right to vote on any amendment to the Certificate of Incorporation which would deprive the common stockholders of that right (R. ~~1512-1518~~. 504-506)

The 1947 Plan of Consolidation carried into it the original provision of the plan of readjustment dated as of January 16, 1935, which meant that upon elimination of the B stock the common stockholders were to elect six and the "A" stockholders five of the directors of Hoe, voting cumulatively as a class. In the period of three years and six months, from the adoption of the 1947 consolidation plan on January 28, 1947, to July 11, 1950, Hoe had redeemed 189,221 shares of B stock out of 383,988 shares originally issued. *The day of the common stockholders' control was fast approaching.*

It was to avoid this inevitable eventuality (*i. e.*, loss of control) provided for in the original Plan of Readjustment in Bankruptcy that the "A" stockholders embarked upon the plan of "consolidation" which is complained of by the petitioner. The chairman of the board of directors elected by the A stockholders bluntly stated the reason for the Plan on March 15, 1950 in a paper entitled

> *"Reasons for acceptance by Class A stockholders* • • •
> 5. *The A stock would retain control of the company free of any threat involved in a coup by the Common stock"* (R. 556).

On July 11, 1950, the said chairman without a corporate resolution, organized a paper corporation, a dummy pure and simple (calling it Hoe Export-Import Corporation), at a cost of $50. It never has had any assets, liabilities or performed any business (R. 72-77).

On July 14, 1950, the "A" directors, over the objection of the two common directors, voted to submit to the "A" stockholders *alone* at a stockholders' meeting scheduled for September 12, 1950, the consolidation of R. Hoe & Co., Inc. with its paper subsidiary Hoe Export-Import Corporation. In the proposed certificate of consolidation, cumulative voting by the common stockholders for their two directors was eliminated, because in the words of the president of Hoe, cumulative voting was "an Unmitigated Curse" (R. 545-6).

In this manner by means of the consolidation and without a vote of the common stockholders the A directors (who were in custodial control only under the Bankruptcy decree until the arrears of dividends, compounded by the issuance of B stock had been eliminated), issued two additional shares of new common stock for each share of A stock outstanding. Thus, control, was intended to and did permanently pass to the A stockholders who now own more than a majority of the common stock and also own their A stock. The common stockholders were given one

share of stock in the new enterprise for each share in the old and their cumulative voting rights were taken away from them without their consent. Since voting of Hoe's common stock is now by a simple majority of the votes cast, the original 160,000 common stockholders have no representation at all. The A shareholders not only elect their own A directors, but also control the election of the two common directors. The disfranchisement of the original 160,000 common stockholders is thus permanently established.

When petitioner sued on August 18, 1950, to enjoin the consummation of this plan of consolidation he was joined in his suit by Alfred D. Martin, a large stockholder and director elected by the common stockholders who had voted against the plan.

That the petitioner on the trial pointedly brought his contention on the subject of the destruction of the cumulative class voting rights of the common stockholders in the election of two directors, to the attention of the trial court, clearly appears from the cross examination of the president of R. Hoe & Co., Inc., one Joseph Auer (R. 339-341). There can therefore be no claim of oversight as a reason for not answering the Federal Questions:

"*Cross Examination by Mr. Garfield:*

Q. You know that at the present time the common stock has the right to cumulative voting in the election of directors? A. *I do.*

Q. *You know, do you not, that that right came to them as a result of the plan of readjustment in the United States District Court on March 1st, 1935.*

Mr. Cullom: I object to that, if the Court please, as argumentative. Your Honor has all the documents before you and you can determine that.

The Court: *They had it at the time the plan was adopted. That is all you need. Never mind where it came from; it was the rule at that time.*

Q. You have told his Honor that this plan did not contemplate doing anything adverse to the common stock, did you not? A. That is right.

Q. *Do you consider the taking away of the right of cumulative voting as an adverse act?* A. *I do not.*

Q. *You do not?* A. *No"* (R. 339).

"Q. Isn't it because you consider that cumulative voting is troublesome to R. Hoe & Company that you want to take it way from the common stockholders, as a class? A. *The answer is definitely yes.*

Q. Were you acquainted with the terms and provisions of the decree of the United States District Court for the Southern District of New York containing the plan of readjustment, signed by Judge Cox, dated March 1st, 1935, at the time you, as a director, took the action leading to submission—

The Court: Why don't you give him a date? Was he acquainted with it on the date of this meeting?" (R. 341).

"Mr. Garfield: On the date of this meeting.

The Witness: Only in generality" (R. 342).

An examination of the "Proxy Statement" filed with the Securities and Exchange Commission shows that Hoe did not reveal that the common stockholders had the right to vote upon any proposed amendment of the Certificate of Incorporation which would deprive the common stockholders of cumulative voting right (R. 482) in the election of directors. It will also be observed that in the "Proxy Statement" dated August 8, 1950 (R. 482) Hoe stated the reason for the disfranchisement of the common stockholders as follows (p. 10 of Proxy Statement):

"Voting Upon the Proposed Consolidation

The affirmative vote of the holders of record of at least two-thirds of the outstanding shares of the Class A stock of the corporation is necessary for the author-

ization of the execution and filing of the proposed Certificate of Consolidation. *The company's charter provides that the holders of B and Common stocks 'shall be specifically excluded from the right to vote in a proceeding * * * for a consolidation pursuant to section 86 of the Stock Corporation Law * * *.' It is the opinion of counsel, therefore that neither the B nor Common stock is entitled to vote on this proposal.* The outstanding stock of Hoe Export-Import Corporation all of which is owned by the Corporation, will be voted in favor of the Plan."

Petitioner's answer to this proposition in every state court to which the matter has been submitted has been that a consolidation is nevertheless a prohibited amendment.

"The Court should pierce the corporate veil of the recently formed dummy, Hoe Export Import Corporation, disregard its form as a subsidiary, and regard it in substance as an instrument or device conceived and created by the Class A directors of R. Hoe & Co., Inc. for the sole purpose of the evasion of the law which gives the common stockholders the right to vote upon the proposed consolidation."

Wormser, *The Disregard of the Corporate Fiction and Allied Corporation Problems,* pages 62-63;
Small v. *Sullivan,* 245 N. Y. 343;
U. S. v. *Lehigh Valley R. R. Co.,* 220 U. S. 257;
Northern Securities Company v. *U. S.,* 193 U. S. 197;
Stockton v. *Central R. R. Co.,* 59 N. J. Eq. 52;
Gregary v. *Helvering,* 293 U. S. 465.

Petitioner has urged below in vain, that where (1) the Plan of Readjustment, in Bankruptcy, dated as of January 16, 1935, (2) the Certificate of Incorporation, dated May

29, 1935, issued pursuant to the Plan of Readjustment, (3) the Certificate of Consolidation, dated January 28, 1947, (4) the petitioner's certificate of stock issued to him on December 23, 1949, all contained the provisions giving to the common stockholders voting as a class the right to elect two directors and provided further that the certificate of incorporation could not be amended without their consent so as to change the cumulative voting rights of the common stockholders, that such amendment could not be accomplished by merely calling it a consolidation. In short the only consolidation contemplated by the charter was one which did not affect the class and other voting rights of the common stockholders. There is no magic in mere nomenclature. A consolidation effects an amendment of the certificate of incorporation under section 86 of the New York Stock Corporation Law, from which we quote in the appendix. If therefore as here the amendment is one which the charter inhibits without the vote of the common stockholders, to permit such amendment without such vote is a deprivation of the common stockholders' property without due process.

Pertinent portions of the record or summary thereof to support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction.

1. Petitioner's Second Amended Complaint (R. 9-16) after setting forth the pertinent provisions of the Plan of Readjustment, dated January 16, 1935, its acceptance by all classes of stockholders, "A" and common, the purchase by petitioner of his shares on December 23, 1949, and the use of the device of consolidation with a paper entity Hoe Export Import Corporation, alleges in Paragraph Ninth (R. 42), the following:

> "Ninth: That to permit the defendants to carry out the said reorganization and recapitalization under

the guise of the aforesaid fraudulent consolidation without permitting the common stockholders the right to vote upon the said reorganization and recapitalization, *would be and does constitute a deprivation of the plaintiff's property without due process of law, contrary* to Article 10, Section 6 of the Constitution of the State of New York and *the Constitution of the United States of America,* Article X, Section 10, and *Amendments 5 and 14 thereof, and in violation of the voting rights conferred upon the Common stockholders as a class, by the decrees of the United States District Court for the Southern District of New York and the Plan of Reorganization therein set forth and incorporated dated March 1, 1935 and April 25, 1935, which decrees and Plan of Reorganization are heretofore referred to in paragraphs 'Second' and 'Third' hereof"* (R. 42).

2. The prayer for relief in the second amended complaint raises the Federal question presented as follows (R. 45):

"WHEREFORE *plaintiff demands judgment* enjoining and restraining the defendants and each of them from holding or permitting the holding of a special meeting of Class 'A' stockholders, pursuant to the Notice of Meeting dated August 8th, 1950, and *for a declaratory judgment that the said proposed meeting if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of the* laws of the State of New York, the Constitution of the State of New York, *the Constitution of the United States of America,* and *Amendments 5 and 14 thereof,* the Securities Exchange Act of 1934, and the appropriate and relevant regulations issued thereunder; and the plaintiff prays for such other alternative or different

relief as may appear to be just and proper in the premises, as well as the costs and disbursements of this action."

(3) *Plaintiff's Proposed Findings of Fact* which were timely submitted to the trial court on October 24, 1950, three days before the rendition of decision on October 27, 1950 (R. 654) makes such full statement of the Federal Questions involved that it would offend the rule against prolixity to quote said proposed findings in full. However they will be found at Record 32-36. These Proposed Findings are deemed to have been refused under section 439 of the New York Civil Practice Act as follows:

"439. *Requests to find.*

Upon a trial by the court without a jury, each party shall be afforded a reasonable opportunity, before the cause is finally submitted to the court, to submit requests to find the essential facts which he deems established by the evidence. Each request must be numbered and so prepared with respect to its length and the subject and phraseology thereof that the court may conveniently pass upon it. *If the court fails to grant a request either specifically or by embodying it in the decision it shall be deemed to have been refused.*"

(4) *The Order Denying plaintiff's motion for a new trial* (timely entered by the trial Justice Cohalan on November 3, 1951 [R49-51], within the thirty days required to take the appeal to the Appellate Division, see section 552 Civil Practice Act, N. Y.) recited the grounds of the motion, calling to the court's attention the decision of the Supreme Court of the United States which the trial court's judgment and decision offended against, namely *Stoll* v. *Gottlieb,* 305 U. S. 165 rehearing denied 305 U. S. 675.

As appears from the order denying such motion for a new trial the grounds of the motion were:

> (a) The trial court has failed to take cognizance of the Plan of Readjustment of the United States District Court 77B proceedings and the orders of the said Court dated March 1, 1935, April 26, 1935 and June 25, 1935, which provide that the common stockholders shall elect two directors voting cumulatively; shall have equal voting rights with the A stockholders on all matters other than the election of directors; and that the Certificate of Incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class.
>
> (b) The controlling decision of the Supreme Court of the United States, *Stoll* v. *Gottlieb*, reported in 305 U. S. 165, rehearing denied 305 U. S. 675, reversing *Gottlieb* v. *Crowe*, 368 Ill. 88, which case as decided by the said Supreme Court of the United States, holds that the courts of the several states must give effect as *res adjudicata* to the terms and provisions of a Plan of Readjustment under a proceeding in 77-B, and that said plan is not subject to collateral attack and that by the court's decision it collaterally attacks and voids as if it never existed, the Plan of Readjustment contained in the order of March 1, 1935 (R. 49-50).

The way in which the questions presented were passed upon by the State courts.

At no time did any judge or Court of the State of New York in the entire course of this litigation directly pass upon the three principal Federal Questions presented to this court for consideration by petitioner. In plain words the questions were ignored by all courts to which they were presented, although the record shows expressly and

by clear intendment that they were adequately presented (*New York, ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63). The State court decisions are purportedly based upon non federal grounds and must be regarded as "so certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question" *Enterprise Irrig. Dist.* v. *Farmer's Mutual Canal Co.,* 243 U. S. 157.

Justice Cohalan the trial justice asserts the validity of the July 1950 plan of consolidation on his own *ipse dixit.* "It is clear that the consolidation as proposed is not illegal. It is equally clear that by the terms of the certificate of incorporation and the plans in existence as of 1950 the present common stockholders have no right to vote on the proposed consolidation" (R. 653). This finding is so clearly contrary to the documentary proof that it may be regarded as (petitioner respectfully submits) an arbitrary device to prevent review by this court.

The trial justice observed that with respect to the 1947 consolidation, the common stockholders did not vote, but he failed to observe that none of their rights or privileges were affected thereby. There is a great distinction between the 1947 consolidation which left the voting rights of the common stockholders unaffected and the 1950 consolidation which destroyed their vested rights to vote cumulatively in the election of two directors.

In a consolidation used to evade a Federal law, this court has held that courts must look to the substance and not to the form of the transaction. In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 345, this Court said "Every corporation created by a State is necessarily subject to the Supreme Law of the land", and at page 347 "no device in evasion of its provisions however skillfully such device may have been contrived, * * * is beyond the reach of the Supreme Law of the land".

The attention of the trial justice was, but in vain, called to the opinion of Justice Reed in *Stoll* v. *Gottlieb,* 305 U. S. 165.

The trial court in relegating the petitioner to the Hobson's choice of taking the new shares or taking appraisal, relied on two New York cases, *Anderson* v. *International Minerals and Chemical Corp.,* 295 N. Y. 343 and *Beloff* v. *Consolidated Edison Co.,* 300 N. Y. 11, in both of which cases the plaintiff was a dissenting stockholder seeking to upset the will of the majority. Here the petitioner is no dissenter from his class. He represents and seeks to vindicate the vested franchise rights on behalf of an entire class of disfranchised common stockholders who have been deprived of the right to vote cumulatively in the election of directors by an amendment of the certificate of incorporation made without their consent.

> "The right of a stockholder to vote for directors is property and he cannot be deprived of it without his consent, even by giving him what others might regard as a better substitute. He cannot be deprived of his own by an offer of something better unless he agrees to it." Lord v. Equitable Life, ~~239 N. Y.~~ 194 N.Y. 212,

The Appellate Division, First Department itself had cited with approval (1920) the case of *Lord V. Equitable Life, supra,* in the earlier case *Matter of the Election of Directors of the Jamaica Consumers Ice Company,* 190 App. Div. 739, unanimously affirmed without opinion, 229 N. Y. 516. A clearer statement on the nature of the vested property right of cumulative voting and its right to protection under the constitution has not been made by any court. At 190 App. Div., p. 741, Philbin, J., writing for the unanimous court, said:

> "While the stockholders, as such, can have no direct power of management, the capital stock owned by them is property. It represents an investment upon which

they are entitled to dividends, provided they are earned, and whether they can be earned or not depends upon management. The right to vote for directors, therefore, is the right to protect property from loss and make it effective in earning dividends. (*Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 228.) *The intent of the law conferring the right to vote cumulatively was undoubtedly to give the minority stockholders an opportunity to secure representation upon the board of directors.*

In Tomlin v. Farmers & Merchants Bank (52 Mo. App. 430, 436) the court said, referring to cumulative voting: 'The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. (*Pierce* v. *Commonwealth,* 104 Pa. St. 155.) It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders.' (See, also Attorney-General v. Looker, 111 Mich. 498; Schmidt v. Mitchell, 101 Ky. 570.)"

Petitioner claims no more in this case than to be bound by the vote of the majority of 160,000 common stockholders of his class. He is no dissenter from those within his class. His right to vote cumulatively in the election of two directors can no more be bartered away than can the elective franchise of voters in Federal elections. Both franchise rights are protected by the United States Constitution. Yet the trial court has ruled that the petitioner is compelled to sell his shares in appraisal or bow to the will of the A shareholders as outlined in the "proxy Statement" which is directly contrary to his ruling on the trial.

"The burden on you gentlemen who are plaintiffs, is to establish that a common stockholder has a right, under the original charter and the many amendments of this corporation, and any direction of the Federal

Court as to those amendments, to be notified of the change that was effected, and to vote with the A and B stockholders at a meeting called to effectuate that change. The proposition of how he should be paid off and that sort of thing, is not the main one'' (R. 119).

Anderson v. *International Minerals, etc.* is so clearly distinguishable that its citation by the trial court may properly be regarded as an evasion of a decision on the Federal Questions presented to it. Plaintiff Anderson had been given an opportunity to vote upon the proposed consolidation along with all other stockholders of his class and two thirds of the stockholders voting assented affirmatively to the consolidation. Anderson was a lone dissenter. He did not avail himself of the opportunity to vote. The only thing sought to be accomplished by the consolidation was a change in the provision for the payment of cumulative dividends as yet unearned, not the destruction of cumulative voting rights in the election of directors. The Court of Appeals limited the dissenter to appraisal.

Beloff v. *Consolidated Edison Co. of N. Y.* is a case *sui generis.* Legislation was passed by the State of New York authorizing the merger of electric gas and steam corporations if approved by the Public Service Commission, where the merging or taking corporation owns 95% or more of the merged or taken corporation. Such merger could take place without the consent of the minority if approval was first obtained from the Public Service Commission.

Consolidated Edison Co. owning 99.6% of Brooklyn Edison Co. having first obtained the requisite approval from the Public Service Commission did so merge the two public utilities without the consent of Beloff, the plaintiff. It offered $135 per share to him or the alternative of appraisal proceedings. He refused and sued to set aside the merger, alleging a violation of the Fourteenth Amendment and section 10 of Article 1 of the United States Constitution.

The decision of Court of Appeals in the *Beloff* case went upon the ground of the express reservation of the power in the New York Constitution to "alter, suspend and repeal charters of corporations" (300 N. Y. p. 19).

In the instant case the change in the voting status of the common stockholders was not effected by the State pursuant to its reserved powers. Reserved power to change or modify the Plan of Readjustment resides only in the United States District Court for the Southern District of New York under the recent pronouncement (February 1, 1951) of the Circuit Court of Appeals for the Second Circuit in *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 Fed. 2nd 525. The Second Circuit specifically overruled a long line of its own decisions which had held that power to supervise, modify or change plans of reorganization was relegated to the States, once the Plan had been adopted and the case closed. It now holds that whether the power of change, modification or alteration is reserved or not, the Bankruptcy Court alone has the discretionary power to alter or modify the plan. "The court may never under the guise of 'alteration' or 'modification' substitute an entirely new plan in place of the original", citing with approval *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 7th Cir., 141 Fed. 2nd 65.

Petitioner sought the intervention of the United States District Court for the Southern District of New York in the bankruptcy proceedings of R. Hoe & Co., Inc. to prevent the violation of the Plan of Readjustment. His petition was dismissed on November 6, 1950 by Judge McGohey whose opinion is printed in the appendix. Judge McGohey ruled:

> "It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep 'leading strings' (in re Flatbush Ave.-Nevins St. Corp., 2nd Cir., 133 F. 2d 760) on or be a 'wet nurse' (North

American Car Corp. v. Peerless W. & W. Mach Corp., 2 Cir., 143 F. 2nd 938) to reorganized concerns. This reorganized debtor was in 1935 sent 'out into the state as fully subject to state law as though this court had nothing to do with its creation.' (In re Ambassador Hotel Corp., 2 Cir., 124 Fed. 2d 435.) The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court. (Davega-City Radio, Inc. v. Boland, S. D. N. Y., 23 F. Supp. 969, 970.)

Petitioner appealed from the order of Judge McGohey to the Circuit Court of Appeals for the Second Circuit, which Court, without so much as permitting the petitioner to file his record (then fully prepared), dismissed the appeal.

It is ironic that after such dismissal the Circuit Court of Appeals for the Second Circuit, on February 1, 1951 in the case of *Prudence Bonds Corp.* v. *City Bank, supra,* specifically overruled the *Flatbush, North American* and *Ambassador Hotel* cases relied on by Judge McGohey and the Appellate Division decided the appeal now before this court without so much as mentioning the Federal Questions presented to it for decision.

The decision of the Appellate Division is as follows:

"*Per Curiam.* This action by a holder of common stock of a corporation claiming to sue on behalf of himself and all other common stockholders, was instituted primarily for an injunction to restrain a corporate consolidation. Months before the appeal was heard, the consolidation had been fully consummated and the stock of the corporation reissued in accordance therewith, after plenary trial in which Special Term had entered judgment in defendant's favor dismissing the complaint on the merits.

Relief was also sought on the ground of fraud but *the evidence supports the trial court's finding that there was no fraud.*

The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties, a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings.

Under the state of facts disclosed, the judgment in favor of defendants-respondents dismissing the complaint and cross complaint, and the order denying plaintiff's motion for a new trial, should be affirmed." (Italics ours.)

The Appellate Division decision is placed upon two grounds both of which are on apparent non federal grounds. Since the Federal Questions were clearly presented in the Second Amended Complaint, and a decision on the Federal Questions Presented was necessary to a determination of the case, petitioner shall endeavor to show, that neither of the grounds assigned for decision are tenable to defeat review by this court.

(1) The Appellate Division said:

"* * * the evidence supports the trial court's finding that there was no fraud."

This is what the trial court actually said (R. 653):

"There has been no showing of fraud and while a serious effort has been made to show that the plan will

not be beneficial to the corporation itself and will be harmful to the common stockholders, such a showing has not been made and no basis has been presented which would justify this court in exercising its visitorial powers."

Petitioner submits that he did not ask the intervention of the visitorial power of the state courts because of fraud or improvidence of the Hoe directors as to the economic wisdom of the plan, as claimed by the trial court. Petitioner merely sought the vindication of his vested property rights contained in the Hoe Plan of Readjustment in Bankruptcy, in the charter issued pursuant thereto, in the 1947 Consolidation Certificate (R. 490) and in petitioner's present stock certificates. The gravamen of petitioner's cause of action is in contract. As was previously shown the trial court so ruled during the trial (R. 119) and petitioner acquiesced in said ruling (R. 120). But even if it were necessary for petitioner to establish fraud, the device of "consolidation" with the phantom, Hoe Export Import Corporation is so patently fraudulent as to be declarable as such, by this court despite the contrary decision of the trial court and Appellate Division. Moreover it is a fraudulent destruction of the rights protected by Federal law which petitioner seeks to vindicate.

(2) The Appellate Division itself permitted the consummation of the plan of consolidation by vacating its own stay, in November 1950, three months before the appeal could be heard on the merits. The chronology is stated in the opinion of McNally, J., in his decision in the appraisal proceedings (*Application of Wood, et al.*, Jan. 26, 1951, 103 N. Y. S. 110, 112, not officially reported):

"It appears that on or about August 8, 1950 an action was instituted entitled, 'Katz v. Hoe', having for its purpose the staying of the pending consolidation of the respondent with Hoe Import-Export Corpora-

tion. On September 11, 1950 an injunction issued from the Appellate Division in said action staying the respondent herein from filing the certificate of consolidation. Thereafter and on October 4, 1950, 277 App. Div. 966, 99 N. Y. S. 2d 853, the Appellate Division stayed the respondent from all proceedings with respect to the proposed consolidation pending the trial of the action entitled 'Katz v. Hoe.' On November 1, 1950 a further stay of the filing of the certificate of consolidation issued from the Appellate Division. Subsequently the respondent was relieved of the stay and thus enabled ~~him~~ on November 29, 1950 to file and thereby complete the consolidation."

Where therefore the Appellate Division was itself responsible for the *vacatur* of the stay, it should not be permitted by its own decision to perpetuate a deprivation of petitioner's property rights under the doctrine of balancing equities. (See *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 678.)

(3) Furthermore in asserting that petitioner and the defendant Martin were the only common stockholders litigating the questions before it the Appellate Division overlooked the ruling of the trial court which excluded proof of acquiescence by the great bulk of the common stockholders in the present suit. The Trial Court ruled:

"Mr. Baron: All right, sir. I offer it on this further ground, that it does indicate that neither the plaintiff nor for that matter, the defendant Martin stand alone; that the wishes of the common stockholders—

"The Court: I am not interested in that. If a man stands alone and still has rights, as far as I can, I will enforce those rights. My ruling is, I don't care about the number of people who may have taken a particular course at a particular time. If any one person is wronged, and that goes for your client and for the

other plaintiffs here, by what was done, that is enough for me. It is a basis for any action I will take. On the other hand, if no one person in any class was wronged, nobody else in that class was hurt, whether they are here or not" (R. 122-123).

It is not mete therefore, for the Appellate Division to count heads on appeal, when proof of the number of participants on the side of the petitioner was excluded by the trial court and acquiesced in by the parties on the ground that "If a man stands alone and still has rights, as far as I can, I will enforce those rights."

Reasons for Granting the Writ

It is apparent that the State courts have by evasion of the Federal Questions involved, though properly presented to them, decided the case in a way probably not in accord with applicable decisions of this court. The controlling decision of this court in *Stoll* v. *Gottlieb,* 305 U. S. 165, has been ignored on the question of *res adjudicata.* The State courts have in effect held that once the debtor R. Hoe & Co., Inc., was discharged in the 77B proceedings, the Plan of Readjustment ceased to have any effect on the rights of stockholders and only its certificate of incorporation was effective to control the rights of the parties. It has been held in effect that the tail wags the dog and not the dog the tail.

Once this principle is established (as it now is by the State courts decision in this case), it becomes futile for people involved in 77B or Chandler Act proceedings to attempt to define their prospective voting rights with meticulous care. Any State court by winking at a change of plan and calling it a "consolidation" could sanction the greatest destruction of vested voting rights by invoking the doctrine of non interference with corporate

management. Such a decision if permitted to stand will in the future be a source of great danger to the vesting voting rights of innocent stockholders who have thought themselves protected by the judgments *in rem* issued by bankruptcy courts.

Furthermore the State courts' decisions fly in the face of uniform circuit court opinions of two circuits to wit: *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 Fed. 2nd 525 (2nd) and *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 141 Fed. 2nd 935 (7th). Both of these courts unite in holding that not even the Bankruptcy court (whether power to do so is reserved or not), has the right to alter vested rights provided for in a plan of reorganization without the consent of the parties affected.

But the State courts have countenanced the violation of this vested right of petitioner and his class to vote because of this so-called right to "consolidate" contained in the Hoe Charter. The answer to this is that:

> "No Corporate person can excuse a departure or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence." Harlan J. in *Northern Securities Co.* v. *United States, supra.*

Furthermore, while this court in *Looker* v. *Maynard*, 179 U. S. 46, ruled that a state legislature may, under its reserved power so amend charters of corporations so as to grant cumulative voting rights to stockholders (and by like token take them away) without offending the due process clauses of the United States Constitution, it was careful to point out that this ruling did not apply "to an agreement collateral to the charter, and which the legislature could not reserve the power to alter or repeal."

Cumulative voting is mandatory by statute in at least eight states, of which Pennsylvania is industrially the most important. In those states it represents a Magna Carta for stock interests less than a majority. But New York is not among the states where cumulative voting is mandatory. In this case cumulative voting is by contract of the parties. Once authorized it is a vested property right. Petitioner comes by his cumulative voting rights by the succession of contractual obligations above enumerated. Not the state legislature but a group of A directors by their unilateral action seeking to vest control permanently in themselves contrary to a Plan of Readjustment in Bankruptcy, aided by the State courts have deprived the petitioner and all other common stockholders of Hoe, of their vested voting rights. This is manifestly a great wrong prohibited by Federal statute and the fifth and fourteenth amendments to the United States Constitution.

While the trial court held that dissenting common stockholders "have an adequate remedy under section 21 of the stock corporation law", *i. e.*, appraisal, it omitted to mention that to petitioner and to holders of a majority of common stock which did not avail themselves of the doubtful privilege of a lawsuit over the value of their shares (see *Application of Wood,* 103 N. Y. Supp. 110, where the Hoe appraisal lawsuit is reported), *the time to file for appraisal expired 20 days before the meeting called for September 12, 1950.* If therefore, petitioner had a vested property right to vote his shares cumulatively and to vote on the amendment of the certificate of incorporation he could not be compelled to forego that privilege in exchange for a bitterly fought lawsuit. No one offered him ten cents for his shares in advance of the meeting. Indeed the management of Hoe claimed before appraisal that the shares had little or no value since there was a book deficit against them. Of the two alternatives the lawsuit which leaves his shares intact or the lawsuit which takes his shares away and gives him the privilege of litigating in a state

where he would have to waive Federal jurisdiction because of diversity of citizenship the former is the lesser evil. No man is compelled to buy a lawsuit and that is what appraisal does. Appraisal was never designed to serve as the sole remedy of an entire class of disfranchised stockholders. Such disfranchisement does indeed offend the Fifth and Fourteenth Amendments of the United States Constitution and it is important that this Court so rule.

Importance of the Issues Herein

It is of tremendous importance to the country at large that the supremacy of the Federal power over bankruptcy proceedings be maintained and that Plans of Reorganization be carried out and not frustrated by those in temporary custodial control, such as the A stockholders in this case. The conflict between the rule apparently followed by the State courts in this case and that of two Circuit Courts of Appeals is not conducive to legal stability of property rights vested under plans of reorganization since they are now divestible by state interpretation in conflict with the letter and spirit of Plans of Reorganization in Bankruptcy.

It is of tremendous importance to stockholders, large and small alike, that the rights of cumulative voting granted by contract to stockholders be protected by this court as a vested property right, so that stockholders like the holders of 93,000 common shares in this case will not again be compelled to risk a lawsuit to preserve their voting rights and thereby waive appraisal, doubtful as it may be as a remedy.

From the sheer monetary point of view, the petitioner and the holders of 93,000 common shares of Hoe have been deprived of property without compensation worth over $1,500,000. This is arrived at as follows:

Considering that there were 95,997 shares of A stock outstanding at the time of the consolidation and that two

shares of new common stock (having a present market value of eight dollars per share), were issued without lawful right, for each A share outstanding, the amount unlawfully taken was $1,535,952.00. If it is impossible to unscramble the omelette, as ruled by the Appellate Division, the common stockholders are clearly entitled to an award of damages for such unlawful taking of their property.

Aside from the frustration of the Plan of Readjustment and the decrees of the United States District Court approving same the testimony showed that $991,000 per year of income (R. 182—1950 as a base) has been taken from common stockholders consisting of upwards of 500 individuals located in every state in the union and distributed to the A stockholders as owners of the newly issued common stock. Shocking as such deprivation of income and principal may be to the individuals involved it is submitted that they can more readily stand the loss to their pocketbooks than the system of justice, which makes it possible, can afford to permit such an unjust judgment to stand. It is respectfully submitted that this court grant a writ of certiorari herein for the purpose of advising the predatory elements in the financial community responsible for these acts that it will not sanction the destruction of vested cumulative voting rights of shareholders by sham and pretend consolidations such as has been sanctioned in this case by the Courts of the State of New York.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari be granted.

GUSTAVE B. GARFIELD,
Attorney for Petitioner.

October 1, 1951.

Appendix.

(1) Petitioner's cumulative voting rights and the source thereof.

On the reverse side of petitioner's and all other common stockholders certificates of stock from February 28, 1947 onward up to and including the filing of the certificate of consolidation on November 29, 1950 was the printed matter defining the voting rights of the respective classes of stock appearing at Record pages 494 to 508 inclusive. In so far as it defines the petitioners cumulative voting rights it is as follows:

"R. HOE & CO., INC.

A STATEMENT OF DESIGNATIONS, PREFERENCES, PRIVILEGES AND VOTING POWERS OF THE CLASS A STOCK, B STOCK AND COMMON STOCK WHICH THE CORPORATION IS AUTHORIZED TO ISSUE AND THE RESTRICTIONS OR QUALIFICATIONS THEREOF FOLLOWS:

In paragraph Fifth, sub. (h) of the said 1947 Certification of Incorporated Consolidation it was provided: "*Continuing until no shares of B Stock shall be deemed to be outstanding, and until all dividends accumulated since October 15, 1946 and unpaid on the Class A stock are paid in full through the last quarterly dividend period, the holders of Class A stock voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of Directors and the holders of the Common Stock, voting cumulatively as a class, shall be entitled to elect and continue in office, the two other members of the Board of Directors*" (R. ~~1512~~). (R. 510)

In paragraph Sixth sub. (k) of the 1947 Certificate of Incorporation and of Consolidation it was provided: "*except with the consent of a majority of the Common Stock, no amendment of the Certificate*

of Incorporation or Certificate of Consolidation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors, from the time such right commences as provided in subparagraph (h) as such Board shall be constituted from time to time" (R. ~~1518~~ 506)

The Plan of Readjustment of R. Hoe & Co., Inc. dated as of January 16, 1935 provided; at page 2 under "Introductory Statement" Paragraph 2:

> "* * * until all the arrearages of dividends on the Class 'A' stock shall have been paid, the Class 'A' stockholders will be entitled to elect nine directors and the common stockholders two directors * * *. *All voting for directors will be cumulative."*

On page 6 of the plan of readjustment, the following provision appears:

> "THE PLAN OF READJUSTMENT
>
> *The Company hereby proposes this Plan for the readjustment of R. Hoe & Co. (herein referred to as the 'Company') and its properties and for the readjustment of the respective interests therein of the holders of securities and obligations of, and claims against, the Company. The Plan and each and every provision thereof is hereby made expressly subject to the provisions of Section 77B of the Bankruptcy Act."*

The provisions of Section 77B (48 Stat. 912) of the *Bankruptcy Act* are as follows:

> "(h) Upon final confirmation of the plan the debtor * * * shall put into effect and carry out the plan

and the orders of the judge relative thereto under and subject to the supervision and control of the judge and the property dealt with by the plan, when transferred and conveyed by the Trustee or Trustees to the debtor * * * shall be free and clear of all claims of the debtor, *its stockholders* and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention * * *. Such final decree shall discharge the debtor from its debts and liabilities, *and shall terminate and end all rights and interests of its stockholders except as provided in the plan or as may be reserved, as aforesaid.*"

"(p) *This section* shall take effect and be in force from and after June 7th, 1934, and *shall apply* as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, *their stockholders and creditors, whose interests or debts are acquired or incurred after such date.*" (Italics ours.)

The provisions of the Plan of Readjustment which state the time when and the manner in which the holders of the common stock voting cumulatively as a class shall be entitled to elect and continue in office two members of the Board of Directors, are contained in *page 22 of the Plan, Article IV "Miscellaneous Provisions", section "1".* The said section, in substance, provides that upon the termination of the right of the prior preferred stock voting cumulatively to elect six out of the eleven directors, the remaining five being elected by the "A" stockholders voting cumulatively, the right to elect the eleven directors devolves upon the "A" stockholders who are to elect nine directors voting cumulatively, and the common

stockholders who are to elect two directors voting cumulatively. The prior preferred stock, was fully paid off and liquidated in 1946 (Deft. Martin's Exhibit O.-R. 576). This appears from the debtor's Annual Report, in which it is said:

> "For the first time since R. Hoe & Co., Inc. became a publicly-owned enterprise in 1924, *the Company is entirely free of long-term debt and has no bonds, preferred stock or bank loans outstanding.*" • • •
>
> "*Thus, the Class 'A' stock has become the senior security of the Company* • • •".

The exact provision of the Plan of Readjustment vesting in the common stockholders the right to elect two directors, voting cumulatively as a class, is as follows (p. 22):

> "1. The certificate of incorporation and by-laws of the Company shall be amended so as to provide that the Board of Directors of the Company shall consist of eleven members. During the period or periods in which the Prior Preferred stock shall have the right, voting cumulatively, to elect and continue in office six members of the Board of Directors of the Company, the Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office the other five members of the Board. Upon the termination of the right of the Prior preferred stock to elect and continue in office six members of the Board of Directors and continuing until all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period, the holders of the Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of

Directors and *the holders of the common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the Board of Directors.*"

The provisions of the Plan of Readjustment which confer upon the common stockholders the right to take over control of the Company from the "A" directors, which vests them with equal voting privileges on all matters except the election of directors, *and which forbid the amendment of the Certificate of Incorporation without their consent, are contained in the same paragraph "Miscellaneous Provisions", subdivision "1",* and continues as follows:

"After all accumulated and unpaid dividends on the Class 'A' stock are paid in full as aforesaid, the voting rights in respect to directors shall be as now set forth in the certificate of incorporation of the Company, except that at all times the holders of Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office at least five of the eleven directors.

The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class 'A' stock, except as in Article III hereof specified as to the prior preferred stock and the preferred stock, and except that the common stock voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the company pursuant to Section 105 of the Stock Corporation Law of the State of New York; PROVIDED, HOWEVER, that after all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period and thereafter so long as the Company is not in default in four or more quarterly dividends

on the Class 'A' stock, whether consecutive or not, the common stock voting as a class shall have equal rights with the Class 'A' stock voting as a class on all matters other than the election of directors; *and* PROVIDED, FURTHER *that except with the consent of a majority of the common stock no amendment of the certificate of incorporation shall be made which shall impair the right of the common stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the Class voting rights of the common stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence.*"

(2) The elimination of petitioner's cumulative voting rights as a common stockholder.

In the proposed certificate of consolidation (since acted upon), set forth as Exhibit "A" annexed to the "Proxy Statement", (R. 48) it was provided in *Paragraph "Tenth":*

> "At any meeting of stockholders, each stockholder of record present in person or by proxy and having the right to vote thereat, shall be entitled to one vote for each share of stock with voting power standing in his name on the books of the corporation; AND NO STOCKHOLDER SHALL BE ENTITLED TO VOTE HIS SHARES CUMULATIVELY FOR THE ELECTION OF DIRECTORS."

In the proxy statement itself the President of R. Hoe & Co., Inc. said (p. 5):

> "Attention is called to the fact that upon the effectiveness of the consolidation, no stockholder shall have the right to vote his shares cumulatively for the election of directors."

(3) Extracts from pertinent provisions of the New York State Stock Corporation Law.

§ 86. *Consolidation.* Any two or more domestic business corporations may be consolidated into a single corporation, which may be either a new corporation or any one of the constituent corporations, by the filing of a certificate which shall be entitled and endorsed "Certificate of consolidation of..... and.....into ....., pursuant to section eighty-six of the stock corporation law" (the first blank spaces being filled in with the names of the constituent corporations and the last blank space being filled in with the name of the corporation formed by or which is to survive the consolidation) and which shall set forth:

1. The name of each corporation to be included in the consolidation, and the date of filing its certificate of incorporation in the department of state, or, if any such corporation is created by a special law and has no certificate of incorporation, the chapter number and year of passage of such law. * * *

Such certificate shall be either:

a. *Subscribed and acknowledged, in person or by proxy, by the holders of record of all the outstanding shares* of each constituent corporation entitled to vote thereon, and shall have annexed an affidavit by the secretary or an assistant secretary of each corporation that the persons who have executed the certificate, in person or by proxy, include the holders of record of all of the outstanding *shares of such corporation entitled to vote thereon;* or

b. *Subscribed and acknowledged by the president or a vice-president and the secretary or an assistant secretary of each constituent corporation who shall make and annex*

an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by proxy, of the holders of record of two-thirds of the outstanding shares of such corporation entitled to vote thereon, and that such votes were cast at a stockholders' meeting held upon notice as prescribed in section forty-five of the stock corporation law to every *stockholder of record of the corporation entitled to vote thereon,* and the date of such meeting.

Such certificate shall be filed in the department of state and the secretary of state shall make, certify and transmit a copy thereof to the clerk of the county in which the office of the consolidated corporation is to be located, which copy shall be filed by such clerk.

* * *

Upon the filing of such certificate the certificate of incorporation or special law incorporating any constituent corporation surviving the *consolidation shall be deemed amended* to the extent necessary to bring such certificate of incorporation or special law into conformity with the provisions of the certificate of consolidation.

§ 87. *Rights of dissenting stockholders.* Any stockholder not voting in favor of such consolidation may at any time prior to the vote on such consolidation—or if notice of the meeting to vote on such consolidation was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such consolidation and demand payment for his stock. Such stockholder or such consolidated corporation shall have the right, subject to the conditions and provisions of section twenty-one to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and

filed with the constituent corporation of which he is a stockholder or with the consolidated corporation. If the consent to such consolidation is given in writing without a meeting by the stockholders of any constituent corporation the time of a stockholder of such constituent corporation to file his objection and demand shall expire on the twentieth day after the mailing to such stockholder of a notice setting forth the plan of consolidation and stating that the consent in writing of stockholders entitled to vote thereon of such constituent corporation has been given to such consolidation pursuant to section eighty-six.

SUMMARY OF § 21. *Determination of value of stock of objecting stockholders.*

1. Provides for the making of an offer of purchase by the consolidated corporation to objecting stockholders and since no offer of any kind was made to objecting stockholders in this case, is not applicable.

2. Provides for allocation of assets in the event of such purchase mentioned in 1. above and is not applicable.

3. Provides that if the corporation shall make no offer, either the objecting stockholder or the corporation may apply to the supreme court in the judicial district where the corporation is located to determine the value of such stock. The petition shall be on five days notice and shall be made returnable on the fiftieth day after the last day on which demand might have been made.

4. Provides that the court shall determine the value of the shares and recites that it may appoint an appraiser. The items going the appraisers determination and the procedures for obtaining payment are set forth herein.